Mawar Biru Sdn Bhd v Lim Kai Chew

HIGH COURT (JOHORE BAHRU) — ORIGINATING SUMMONS NO 24-676 OF 1989
JAMES FOONG JC
30 JANUARY 1992

Land Law *— Caveat — Wrongful entry — Assessment of damages — Approach — Actual loss — National Land Code 1965 s 329(1)*

On 30 May 1985, the plaintiff entered into an agreement with the defendant to purchase a piece of land for a sum of $1,655,809.60. However, the defendant rescinded the said agreement alleging that the plaintiff had breached the terms of the said agreement. The plaintiff then entered a caveat over the land and commenced a suit against the defendant. On 1 August 1989, the defendant contracted in writing to sell the land to a third party for a sum of $3.005m ('principal agreement'). Altogether, a total sum of $305,050 was paid by the third party to the defendant's solicitors. On 7 November 1989 the defendant and the third party entered into a supplementary agreement giving the third party the right of first refusal to purchase the land for and at the purchase price stated in the principal agreement and on the same terms and conditions if the plaintiff's caveat was removed after 1 June 1990. By 1 June 1990, the plaintiff's caveat was still not removed and the defendant and the third party terminated the principal and supplementary agreements. The sum of $305,050 was refunded to the third party. On 23 June 1990, on an application made by the defendant, the High Court ordered that the plaintiff's caveat be removed and damages be awarded against the plaintiff to be assessed. On 30 October 1990, the Registrar of Titles removed the caveat. On 11 June 1991, the Supreme Court dismissed the plaintiff's appeal. However, the defendant refused to offer to sell the land to the third party or to put it in the market as he was worried of the outcome of the pending suit between him and the plaintiff in relation to the rescission of the agreement dated 30 May 1985. At the hearing for the assessment of damages, the defendant claimed, as damages, loss of interest on the balance of the purchase price allegedly payable under the principal and supplementary agreements with the third party in respect of the said property.

Held, making no award for damages:

(1) In a hearing for assessment of damages, the burden is on the defendant to prove real and actual loss.

(2) The usual approach to damages in these type of cases is by determining, in the first instance, whether there is a property value loss in that there is a decrease in the price of the said property after the same is offered for sale subsequent to the caveat being removed. On the facts, the court finds no evidence of any property value loss.

(3) The defendant failed to establish as a matter of fact that he has obtained, or will be under a contractual obligation to obtain, a definite sum of $3.005m since the land has not been sold. Unless the money is already in hand, or will be received under a firm contractual obligation, the defendant suffers no real loss in terms of interest since there is no money or money due in the first place.

(4) Though the defendant's agreements with the third party may have been completed if not for the caveat, these transactions were mutually terminated under their respective terms. When such contractual rights were terminated, the defendant cannot utilize these agreements to support his claim based on the theory, 'as if the money is being received' when, in actual fact, these contractual obligations to pay by the third party had ended.

(5) As the defendant has failed to prove actual loss, no award for damages is made.

[Bahasa Malaysia summary

Pada 30 Mei 1985, plaintif telah mengikat satu perjanjian dengan defendan untuk membeli sebidang tanah untuk jumlah $1,655,809.60. Walau bagaimanapun, defendan telah membatalkan perjanjian itu dengan mendakwa bahawa plaintif telah mengingkari syarat perjanjian itu. Plaintif telah memasukkan satu kaveat ke atas tanah itu dan memulakan guaman terhadap defendan. Pada 1 Ogos 1989, defendan membuat kontrak dalam tulisan untuk menjual tanah itu kepada satu pihak ketiga bagi jumlah $3.005 juta ('perjanjian utama'). Pada keseluruhannya, sejumlah $305,050 telah dibayar oleh pihak ketiga kepada peguamcara defendan. Pada 7 November 1989 defendan dan pihak ketiga telah mengikat satu perjanjian tambahan untuk memberikan kepada pihak ketiga itu hak penolakan pertama (right of first refusal) untuk membeli tanah itu untuk dan pada harga pembelian yang dinyatakan dalam perjanjian utama dan atas syarat dan terma yang sama jika kaveat plaintif diketepikan selepas 1 Jun 1990. Menjelang 1 Jun 1990, kaveat plaintif masih belum diketepikan dan defendan dan pihak ketiga telah menamatkan perjanjian utama dan tambahan. Jumlah $305,050 itu telah dibayar balik kepada pihak ketiga. Pada 23 Jun 1990, atas satu permohonan oleh defendan, Mahkamah Tinggi memerintahkan supaya kaveat plaintif diketepikan dan ganti rugi diberikan terhadap plaintif, jumlahnya akan ditaksir. Pada 30 Oktober 1990, Pendaftar Hakmilik mengetepikan kaveat itu. Pada 11 Jun 1991, Mahkamah Agung menolak rayuan plaintif. Namun demikian, defendant enggan membuat tawaran menjual tanah itu kepada pihak ketiga itu atau meletakkannya dalam pasaran kerana beliau khuatir akan keputusan guaman antara beliau dan plaintiff berkenaan dengan pembatalan perjanjian bertarikh 30 Mei 1985. Di perbicaraan untuk pentaksiran ganti rugi, defendan menuntut, sebagai ganti rugi, kehilangan bunga atas baki harga pembelian yang didakwa kena dibayar di bawah perjanjian utama dan tambahan dengan pihak ketiga itu berkenaan dengan tanah itu.

Diputuskan, tidak menawarkan ganti rugi: A

(1) Di dalam perbicaraan untuk pentaksiran ganti rugi, beban terletak pada defendan untuk membuktikan kehilangan benar dan sahih.

(2) Cara yang biasa untuk mentaksir ganti rugi di dalam kes sebegini ialah dengan menentukan, pertama sekali, sama ada terdapat kehilangan nilai tanah itu iaitu terdapat kejatuhan dalam harga tanah tersebut selepas ianya ditawarkan untuk jualan selepas kaveat itu diketepikan. Mengikut fakta kes, mahkamah tidak menjumpai apa-apa keterangan tentang kehilangan nilai tanah itu. B

(3) Defendan gagal mendirikan sebagai satu perkara fakta bahawa beliau telah memperolehi, atau akan berada di bawah kewajipan kontrak untuk memperolehi, satu jumlah $3.005 juta yang pasti kerana tanah itu tidak dijual. Melainkan wang itu telah berada dalam tangan, atau akan diterima di bawah satu kewajipan kontrak yang pasti, defendan tidak menanggung kehilangan benar dalam bentuk bunga memandangkan tidak ada wang atau wang yang kena dibayar pada mulanya. C D

(4) Walaupun perjanjian defendan dengan pihak ketiga mungkin boleh diselesaikan kalaulah tidak kerana kaveat itu, transaksi itu telah ditamatkan bersama mengikut syarat masing-masing. Apabila hak kontrak sedemikian ditamatkan, defendan tidak boleh menggunakan perjanjian itu untuk menyokong tuntutannya berdasarkan teori 'as if the money is being received' walhal, pada hakikatnya, kewajipan pihak ketiga di bawah kontrak itu telah tamat. E

(5) Oleh kerana defendan telah gagal membuktikan kehilangan sebenar, tiada ganti rugi diberikan.]

Case referred to

1 *Ashcroft v Curtin* [1973] 3 All ER 1208 (folld) F

Arthur Lee Meng Kwang (*Arthur Lee & Co*) for the applicant/defendant.
Wong Kim Fatt (*Yeo & Co*) for the respondent/plaintiff.

Cur Adv Vult G

James Foong JC: This is a hearing for assessment of damages made pursuant to an order of Abu Mansor J on 26 June 1991 (hereinafter referred to as 'the said order').

Briefly the facts are as follows. The plaintiff entered into an agreement to purchase a piece of property from the defendant. In relation to this purchase, a caveat was lodged over the said property by the plaintiff, their servant and/or agent. On an application for the removal of the said caveat, Abu Mansor J ordered that the said caveat be removed and that damages be awarded against the plaintiff, the caveator of the said property. H

An appeal against this said order was heard by the Supreme Court and on 11 June 1991 this appeal was dismissed, thereby confirming the order made by Abu Mansor J. I

The hearing before me now is for assessment of damages for the wrongful lodgement of the said caveat. During this hearing, learned counsel for

the defendant, Mr Arthur Lee, submitted to me that there is no necessity for the defendant to prove that the caveat was wrongfully entered on the said property by the plaintiff, as this had already been decided and confirmed by the Supreme Court. What is left now to be decided is the question of damages as provided under the said order and, as provided for under s 329(1) of the National Land Code 1965 which reads as follows:

> Any person or body who wrongfully or without reasonable cause, secures the entry of, or fails to withdraw any private caveat shall be liable to pay compensation to any person or body who thereby suffers any damages or loss.

On this point, I am in full agreement.

Now, turning to the question of damages, Mr Arthur Lee also submitted to me that any damages to be awarded in this case must be related to actual loss.

In support of his claim, the defendant testified to the following facts:

(1) the defendant entered into a sale and purchase agreement with the plaintiff on 30 May 1985 (I shall refer to this agreement as 'the Mawar agreement') for the sale of the said property for a sum of $1,655,809.60;
(2) this sale and purchase was, as alleged by the defendant, to have been rescinded due to the plaintiff's breach of the terms and conditions of the Mawar agreement;
(3) subsequent to the aforesaid, the defendant on 1 August 1989 contracted in writing to sell the said property to one M/s Chieng Chuang Construction Co Pte Ltd (hereinafter referred to as 'Chieng Chuang') for a sum of $3.005m; (this contract I shall hereinafter refer to as 'Chieng Chuang's contract');
(4) pursuant to Chieng Chuang's contract, the defendant received a sum of $30,550 as deposit and part payment towards the purchase price;
(5) being aware that the said caveat was not removed from the said property, Chieng Chuang with the consent of the defendant paid a further sum of $274,500 to the defendant's solicitors as stakeholders. This sum was kept in a fixed deposit account and of which interest, until its subsequent return to Chieng Chuang, was forwarded to the defendant for his benefit;
(6) on 7 November 1989, realizing that the said caveat had yet to be removed, Chieng Chuang and the defendant entered into a supplementary agreement to vary the terms of Chieng Chuang's contract. (This supplementary agreement I shall hereinafter refer to as 'the supplementary contract'.) This supplementary contract provided, inter alia, the following terms:
    (i) the completion date for the purchase of the said property by Chieng Chuang was deferred to 1 June 1990 on condition that the said caveat be removed by that time;
    (ii) that in the event that the said caveat was not removed by 1 June 1990, the defendant and his solicitors should refund to Chieng Chuang the sum of $30,550 and $274,500 respectively so paid earlier under Chieng Chuang's contract without interest and, the sale and purchase of the said property between Chieng Chuang and the defendant would terminate;

(iii) if the said caveat was removed after the deferred date of completion, ie 1 June 1990, Chieng Chuang 'shall be given the right of first refusal to purchase the said land for and at the purchase price stated in the principal agreement (ie Chieng Chuang's contract) and on the same terms and conditions contained in the principal agreement;

(7) by 1 June 1990, the said caveat was still not removed and the defendant and his solicitors accordingly refunded to Chieng Chuang the sum of $30,550 and $274,500 respectively and the sale and purchase of the said property to Chieng Chuang was terminated;

(8) on 30 October 1990 the Registrar of Titles removed the said caveat;

(9) on 11 June 1991 the Supreme Court gave its decision rejecting the plaintiff's appeal.

Basing on the aforesaid events, the defendant now asserts that he has suffered loss by not having the use of the balance of the purchase price which Chieng Chuang would have given to him if the said caveat was removed. As a result of the plaintiff's wrongful act, he has lost on the interest derived from the balance of the purchase price when the same can be placed by way of fixed deposit in a banking account. Various due dates for payment of the balance of the purchase price under Chieng Chuang's contract and the supplementary contract were highlighted. The cut-off date for the calculation of the loss of interest as submitted by Mr Arthur Lee should be 11 June 1991, the date when the Supreme Court gave its decision in rejecting the plaintiff's appeal.

Mr Wong Kim Fatt, counsel for the plaintiff, strenuously argued before me that the defendant has suffered no loss; in fact the defendant has gained under the agreements to sell the said property to Chieng Chuang due to the increase in the purchase price as compared to the Mawar agreement.

The usual approach to damages in these type of cases is by determining, in the first instance, whether there is a property value loss. By this, I mean whether there is a decrease in the price of the said property after the same is offered for sale subsequent to the caveat being lifted. However, from the facts adduced before this court, I find no evidence of any property value loss.

Firstly, the said property is now not offered for sale by the defendant. Secondly, there is no valuation report of whatever nature to indicate the present value of the said property. Therefore, under these circumstances, I find no evidence of any property value loss.

Now I shall proceed to examine whether the defendant is entitled to the damages in another form and that is in the loss of the use of the balance of the purchase price the defendant would have received from Chieng Chuang, if not for the said caveat. I would agree with Mr Arthur Lee that the defendant would have suffered this loss, if Chieng Chuang had exercised their rights to purchase the said property after the lifting of the said caveat and, had paid the balance of the purchase price as agreed upon in the supplementary contract. I would also go further to agree that, this similarly would apply to any third party purchasers who had paid a purchase price equivalent to that paid by Chieng Chuang under the supplementary con-

tract, if Chieng Chuang did not exercise their right of purchase. This is based on the simple rationale that, the defendant has been deprived of the use of the balance of the purchase price from the due dates under the supplementary contract, till the time when the actual purchase price or its equivalent amount to that as stated in the supplementary contract is actually paid. For this he shall be entitled to bank interest based on funds kept in fixed deposit accounts.

However, the circumstances of this case are different in the sense that, the defendant refused to sell or to put his property in the market. His reason for not doing so, particularly in not offering it to Chieng Chuang to purchase it, is because that though the caveat has been lifted he is worried of the outcome of a pending suit between him and the plaintiff, relating to his claim for the rescission of the Mawar agreement.

As the defendant had refused and is now refusing to offer the said property for sale even though the caveat is being lifted, Chieng Chuang cannot exercise their rights of purchase. Consequently, no other person or persons can purchase or offer contractually to purchase the said property since Chieng Chuang has the right to first refusal. Under such circumstances, the defendant cannot establish as a matter of fact, that he has obtained (though it may be late in receiving), or will be under a contractual obligation to obtain, a definite sum of $3.005m since the said property has not been sold. As he has not obtained or will not be obtaining under any firm contractual obligation the sum of $3.005m, the defendant cannot be said to have suffered as at the date of this hearing for assessment of damages, actual loss on the use of $3.005m. Unless the money is already in hand (again, though it may be late in receiving), or will be received under a firm contractual obligation, the defendant suffers no real loss in terms of interest since there is no money or money due in the first place.

Though Chieng Chuang's contract or the supplementary contract may have been completed if not for the caveat, these transactions were mutually terminated under its respective terms. When such contractual rights were terminated, the defendant cannot now utilize these agreements to support his claim based on the theory, 'as if the money is being received' when, in actual fact, these contractual obligations to pay by Chieng Chuang had ended. However, as stated aforesaid, if Chieng Chuang had exercised its right to purchase or that a third party had paid or will be paying the equivalent sum of $3.005m (in the event of Chieng Chuang refusing to purchase in the first instance), then the defendant's claim for loss of use of the said funds during the period as claimed will succeed but not, in a situation such as in this case.

The reason given by the defendant for not offering the said property for sale, not even to Chieng Chuang, is highly unacceptable. Once the said caveat is lifted, the defendant has a legal right to transfer his said property to any other person and/or persons. The pending suit between the defendant and the plaintiff is entirely a different matter from the issue of the caveat, the outcome of which can be compensated by damages if the subject matter, ie the said property, is no longer around. What we are involved in, in this case, is damages and in order to ascertain it there must be real damages as opposed to what might have been the damages.

Damages as submitted by the defendant's counsel, with which I am in total agreement, must be real and actual in this case. In order to prove it, the burden is on the defendant (see the case of *Ashcroft v Curtin*[1]). As far as this case is concerned, the defendant has failed to prove actual loss and I accordingly make no award for damages. As for costs, I will also make no order.

Application dismissed.

Reported by Zarinah Marican